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6 **UNITED STATES DISTRICT COURT**
7 **SOUTHERN DISTRICT OF CALIFORNIA**

8 LEE J. WARE, an individual, and
9 IRMA WARE, an individual,

10 Plaintiff,

11 vs.
12 BAYVIEW LOAN SERVICING,
13 LLC, AZTEC FORECLOSURE
14 CORPORATION, and DOES 1-100,
15 inclusive,

16 Defendants.

17 CASE NO. 13-CV-1310 JLS (NLS)
18 **ORDER GRANTING
19 PRELIMINARY INJUNCTION**

20 Presently before the Court is Plaintiffs Lee J. Ware and Irma Ware's
21 ("Plaintiffs") *ex parte* motion for a temporary restraining order or stay and an order to
22 show cause why a preliminary injunction should not issue. (ECF No. 4.) Plaintiffs seek
23 to prevent Defendant Bayview Loan Servicing, LLC ("Defendant") from foreclosing
24 on Plaintiffs' home throughout the litigation. For the reasons stated below, the Court
25 **DISSOLVES** its June 13, 2013 Order and **GRANTS** Plaintiffs' request for a
26 preliminary injunction.

27 **BACKGROUND**

28 Plaintiffs bring this action against Defendants Bayview Loan Servicing, LLC and
29 Aztec Foreclosure Corporation ("Defendants") asserting four causes of action: (1)
30 violations of California Civil Code § 2923.6; (2) violations of California Business and
31 Professions Code § 17200 et seq.; (3) negligence; and (4) accounting. (Underlying
32 Complaint, ECF No. 1-1.)

1 This action concerns the disputed ownership and loan status of the property at
2 8248 Rockview Drive, El Cajon, CA 92021 (the “Property”). Sometime in 2007,
3 Plaintiffs entered into a written loan agreement for the sum of \$330,000, secured by a
4 deed of trust to the Property. (ECF No. 4 at 9.) Subsequently in 2010, Plaintiffs failed
5 to make all payments required under the loan agreement. (*Id.* at 9-10.) Around this
6 time, Plaintiff applied for a loan modification with Virtual Bank. (*Id.* at 11.) Plaintiffs
7 were allegedly informed that no foreclosure activity would take place while their
8 application was in review. (*Id.* at 10.)

9 On or around April 4, 2011, Defendants allegedly executed a Notice of Default
10 and Election to Sell Under Deed of Trust (“NOD”) on the Property. (ECF No. 4-1.)
11 At this time, Plaintiffs’ loan modification was allegedly “in review.” (ECF No. 4 at 11.)
12 Virtual Bank allegedly made representations to Plaintiff at this time that the loan
13 modification was “imminent.” (*Id.*)

14 In or around July 2011, Plaintiffs filed for Chapter 13 bankruptcy. (*Id.* at 12.)
15 A Chapter 13 Plan was confirmed in or around February 2012. In or around October
16 2012, Sabadell United Bank, N.A., as Receiver for Virtual Bank, filed a motion for
17 relief from stay. (*Id.*) This motion was granted on or about February 12, 2013. (*Id.*)

18 On March 13, 2013, foreclosure trustee Aztec Foreclosure Corporation recorded
19 a Notice of Trustee’s Sale (“NOS”), setting the foreclosure sale date for April 3, 2013.
20 (ECF No. 4-3.) At this time, Virtual Bank allegedly advised Plaintiffs that a short sale
21 was Plaintiffs’ best option, and Plaintiffs submitted an application for a short sale on
22 or around March 18, 2013. (ECF No. 4 at 12-13.)

23 On April 3, 2013, Plaintiffs received a letter informing them that Defendant
24 Bayview Loan Servicing, LLC (“Bayview”), acting as agent on behalf of Virtual Bank,
25 would review Plaintiffs’ request to be offered a foreclosure alternative. On or about
26 April 9, 2013, Plaintiffs received a letter from Bayview stating that Plaintiffs were
27 ineligible for their foreclosure prevention programs because a short sale had not been
28 approved by an investor or group of investors. (ECF No. 4-4.) On or about April 15,

1 2013, Plaintiffs received a notice that the foreclosure sale had been postponed to May
 2 14, 2013. (ECF No. 4-5.) Plaintiffs were allegedly unable to make any constructive
 3 contact with Defendants regarding their short sale denial and potential alternative
 4 options to avoid foreclosure. (ECF No. 4 at 14.) On May 8, 2013, Plaintiffs sent a
 5 letter to Defendants informing them of a material change in their financial
 6 circumstances. (ECF No. 4-6.)

7 On May 9, 2013, Plaintiffs filed the underlying complaint. (ECF No. 1-1.)
 8 Plaintiffs' complaint asserts four causes of action, none of which arise under federal
 9 law. Plaintiff ultimately seeks damages, including punitive damages and interest,
 10 various injunctive relief, disgorgement of all amounts wrongfully taken by Defendants,
 11 and reasonable attorney's fees and costs of suit. (ECF No. 1-1 at 36-37.) On June 6,
 12 2013, Defendants removed the action from the Superior Court of California for the
 13 County of Los Angeles alleging diversity jurisdiction. (ECF No. 1.) On June 13, 2013,
 14 Plaintiffs filed the instant ex parte motion. (ECF No. 4.)

15 After reviewing the materials submitted by the parties, the Court issued an Order
 16 enjoining Defendant from taking any steps to deprive Plaintiffs of their residence in the
 17 Property until the Court could hold a preliminary injunction hearing. (ECF No. 4.) At
 18 the June 27, 2013 preliminary injunction hearing, the Court determined that further
 19 briefing by both parties was necessary to address several issues, including whether
 20 Plaintiffs' 2011 loan modification application was still pending. (ECF No. 15.)
 21 Accordingly, the Court issued an Order continuing the hearing to August 15, 2013, and
 22 setting a briefing schedule for supplemental briefing. (*Id.*)

23 **LEGAL STANDARD**

24 "A plaintiff seeking a preliminary injunction must establish that he is likely to
 25 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 26 preliminary relief, that the balance of equities tips in his favor, and that an injunction
 27 is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20
 28 (2008); *see also Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009).

1 Although all four factors must be met, they operate on a sliding scale. “Under this
 2 approach, the elements of the preliminary injunction test are balanced, so that a
 3 stronger showing of one element may offset a weaker showing of another.” *Alliance*
 4 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). “For example,
 5 a stronger showing of irreparable harm to plaintiff might offset a lesser showing of
 6 likelihood of success on the merits.” *Id.* at 1131.

7 A preliminary injunction is an “extraordinary remedy that may only be
 8 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*,
 9 555 U.S. at 22 (citation omitted). The typical preliminary injunction is prohibitory,
 10 and seeks to “maintain the status quo pending a trial on the merits.” *Mastrovincenzo*
 11 *v. City of N.Y.*, 435 F.3d 78, 89 (2d Cir. 2006); see also *Marlyn Nutraceuticals, Inc.*
 12 *v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-89 (9th Cir. 2009). A mandatory
 13 injunction, in contrast, “orders a responsible party to take action . . . [and] goes well
 14 beyond simply maintaining the status quo” *Marlyn Nutraceuticals*, 571 F.3d at
 15 879 (internal quotations and citations omitted). In this context, the “status quo”
 16 refers to “the last, uncontested status which preceded the pending controversy.” *Id.*
 17 Mandatory injunctions are particularly disfavored, and should not be granted “unless
 18 extreme or very serious damage will result” *Id.*

19 ANALYSIS

20 To prevail, Plaintiffs must establish that: (1) they are likely to succeed on the
 21 merits; (2) they are likely to suffer irreparable harm in the absence of preliminary
 22 relief; (3) the balance of equities tips in their favor; and (4) that an injunction is in
 23 the public interest. *Winter*, 555 U.S. at 20. The Court addresses each of Plaintiffs'
 24 claims in turn.

25 I. Violations of California Civil Code § 2923.6

26 California Civil Code § 2923.6(c) reads as follows:

27 If a borrower submits a complete application for a first lien loan
 28 modification offered by, or through, the borrower's mortgage servicer,
 a mortgage servicer, mortgagee, trustee, beneficiary, or authorized
 agent shall not record a notice of default or notice of sale, or conduct a

1 trustee's sale, while the complete first lien loan modification
2 application is pending. A mortgage servicer, mortgagee, trustee,
3 beneficiary, or authorized agent shall not record a notice of default or
4 notice of sale or conduct a trustee's sale until any of the following
5 occurs:

- 6 (1) The mortgage servicer makes a written determination that the
7 borrower is not eligible for a first lien loan modification, and any
8 appeal period pursuant to subdivision (d) has expired.
9 (2) The borrower does not accept an offered first lien loan
10 modification within 14 days of the offer.
11 (3) The borrower accepts a written first lien loan modification, but
12 defaults on, or otherwise breaches the borrower's obligations under,
13 the first lien loan modification.

14 Further, pursuant to § 2923.6(g), a mortgage servicer is obligated to evaluate
15 applications from borrowers who have already been evaluated or afforded a fair
16 opportunity to be evaluated for a first lien loan modification if "there has been a
17 material change in the borrower's financial circumstances since the date of the
18 borrower's previous application . . ." Cal Civ. Code § 2923.6(g).

19 Plaintiffs contend that Defendants have violated the Homeowner's Bill of
20 Rights ("HOB"), California Civil Code § 2923.6, by: (1) failing to send a written
21 notice identifying the specific reason for the denial of Plaintiffs' application for a
22 first lien loan modification; (2) failing to evaluate Plaintiffs' application after
23 Plaintiffs submitted a notice of material change in their financial circumstances; and
24 (3) "dual tracking" a nonjudicial foreclosure sale while a first lien loan modification
25 application was pending. (ECF No. 1-1 at 22-26.) The Court addresses each in
26 turn.

27 **A. *Written Notice***

28 Plaintiffs claim that Defendant's April 9, 2013 letter violates Civil Code §
2923.6(f) because it fails to adequately identify the reasons for denying Plaintiffs'
request for a short sale. (ECF No. 4 at 21-23, ECF No. 4-4.) However, Civil Code §
2923.6(f) expressly applies to the denial of a "first lien loan modification," and not a
short sale. Plaintiffs have provided no legal support for their conclusory assertions
that a short sale is a lien loan modification under the HOB. Accordingly, Plaintiffs
have failed to establish a likelihood of success as to this claim.

1 ***B. Material Change in Financial Circumstances***

2 On May 8, 2013, Plaintiffs' attorney sent Defendants a letter stating that
 3 "borrowers' routine expenses has increased." (ECF No. 4-6.) Plaintiffs contend that
 4 the letter constituted a notice of material change in their financial circumstances, and
 5 claim that Defendant failed to evaluate Plaintiffs' application pursuant to Civil Code
 6 § 2923.6(g). (ECF No. 4 at 20-21.)

7 The Court finds that Plaintiffs' barebones letter does not satisfy the
 8 requirements of § 2923.6(g), which requires the borrowers to "document" and
 9 "submit" a material change in circumstances. Cal. Civ. Code § 2923.6(g).
 10 Plaintiffs' letter is bereft of any details or documentation. To accept the letter as a
 11 valid notice of material change would be at odds with the very purpose of subsection
 12 (g), which is meant to relieve mortgage servicers from evaluating multiple loan
 13 modification applications submitted for the purpose of delay. *See Cal. Civ. Code* §
 14 2923.6(g)

15 Further, California Civil Code § 2923.6(g) only obligates the mortgage
 16 servicer to evaluate subsequent applications from "borrowers who have already been
 17 evaluated or afforded a fair opportunity to be evaluated." Here, Plaintiffs do not
 18 allege that they submitted a subsequent lien loan modification after documenting
 19 their purported financial change. To the extent that Plaintiffs seem to suggest that
 20 Defendant was required to reevaluate Plaintiffs' original 2011 application, they have
 21 provided no legal support for this assertion. Accordingly, Plaintiffs have failed to
 22 establish a likelihood of success as to this claim.

23 ***C. Dual Tracking***

24 California Civil Code § 2923.6 provides that, "if a borrower submits a
 25 complete application for a first lien loan modification . . . the mortgage servicer . . .
 26 shall not record a notice of default or notice of sale, or conduct a trustee's sale, while
 27 the complete first lien loan modification application is pending." Cal. Civ. Code §
 28 2923.6(c). This statute prohibits the foreclosure process commonly referred to as

1 “dual tracking,” which refers to the lender practice of negotiating with homeowners
 2 in default on their loans while simultaneously advancing the foreclosure process.

3 Plaintiffs claim that Defendants are proceeding with a nonjudicial foreclosure
 4 sale of the Property while Plaintiffs’ first lien loan modification application is in
 5 review. (ECF No. 1-1 at 25.) Although the parties addressed this issue at the June
 6 27, 2013 preliminary injunction hearing, the parties were unable to state whether or
 7 not Plaintiffs’ 2011 application had ever been denied or if it was still pending.
 8 Accordingly, the Court ordered the parties to file supplemental briefing addressing
 9 this issue.

10 Defendant’s supplemental briefing alleges that Plaintiffs were in bankruptcy
 11 proceedings from 2011 until 2013,¹ and that Defendant “does not entertain any loss
 12 mitigation options with borrowers who are in bankruptcy.” Accordingly, Defendant
 13 allegedly “did not move forward with any additional loan modification review after
 14 the stay was lifted in Lee Ware’s bankruptcy in February 2013 and after Irma
 15 Ware’s bankruptcy was dismissed in June 2013 because [Plaintiffs’] financial
 16 documents from 2011 would have been outdated and the Wares previously declined
 17 a loan modification in or about March 2011.” (ECF No. 18 at 4-5.)

18 The Court finds that Plaintiffs have demonstrated a likelihood of success as to
 19 their dual tracking claim against Defendant. Plaintiffs have clearly demonstrated
 20 that their 2011 first lien loan modification was still pending in 2013 at the time
 21 Defendants recorded a notice of trustee’s sale in violation of California Civil Code §
 22 2923.6(c). Although Defendant contends that “[t]here was no pending loan
 23 modification application in review prior to the filing of this Complaint,” the fact
 24 remains that Defendant has never expressly denied Plaintiffs’ 2011 loan
 25 modification application. (ECF No. 18 at 5.) Defendant has provided no factual

26
 27 ¹Specifically, Defendant alleges that Plaintiff Lee Ware was in Chapter 13
 28 Bankruptcy from July 5, 2011 to February 11, 2013. (ECF No. 18 at 4.) Plaintiff Irma
 Ware was also in bankruptcy from April 12, 2013 to April 30, 2013, and subsequently
 refiled for Chapter 13 Bankruptcy on May 14, 2013. Her case was dismissed on June
 3, 2013.

1 support for its contention that the Wares previously declined a loan modification in
 2 or about March 2011, and further failed to brief the Court on this issue despite the
 3 grant of a continuance of the hearing to specifically address this issue. Accordingly,
 4 Plaintiffs have established a likelihood of success as to this claim.

5 **D. Other HOBR Claims**

6 After the June 27, 2013 preliminary injunction hearing, Plaintiffs allegedly
 7 filed a subsequent loan modification application which was summarily denied by
 8 Defendants on July 10, 2013. (ECF No. 20 at 4.) In their supplemental briefing,
 9 Plaintiffs raise additional claims against Defendant alleging further violations of the
 10 HOBR related to these later events. As these claims do not appear in Plaintiffs'
 11 original complaint and are not properly before the Court at this time, the Court
 12 declines to address these issues.

13 **II. Plaintiffs' Other Claims**

14 The Court finds that Plaintiffs have failed to establish a likelihood of success
 15 as to any other claims. Plaintiffs other claims are unsupported by sufficient factual
 16 allegations, and Plaintiffs have not satisfied the requirements to assert a fraud claim
 17 against a corporation under California law. As to their negligence claim, Plaintiffs
 18 have failed to establish that Defendant exceeded its conventional role as a lender of
 19 money and thus owed Plaintiffs a legal duty. Finally, Plaintiffs have not established
 20 any fiduciary duties under which Defendant owed them a detailed accounting.

21 **CONCLUSION**

22 As discussed above, Plaintiffs have established a likelihood of success as to
 23 their claim for a violation of Civil Code § 2923.6. Plaintiffs have further
 24 demonstrated that they will suffer “irreparable harm” from a foreclosure as they will
 25 be evicted from their home. The balance of equities also weighs in Plaintiffs’ favor
 26 as an injunction would only delay Defendant’s right to foreclose. Finally, an
 27 injunction is in the public’s interest as it would enforce a recently enacted law
 28 designed to protect the public from unnecessary foreclosures.

1 Federal Rule of Civil Procedure 65(c) states “the court may issue a
2 preliminary injunction order . . . only if the movant gives security in an amount that
3 the court considers proper to pay costs and damages sustained by any party to have
4 been wrongfully enjoined or restrained.” The outstanding balance as of March 11,
5 2013, as noted on the Notice of Sale, was \$397,993.85. (ECF No. 4-3.) Defendants
6 contend that Plaintiffs should post a bond in the amount of \$89,799.00, the sum of
7 10% interest on the outstanding balance and approximately \$50,000.00 in attorneys’
8 fees and costs. (ECF No. 5 at 25-26.) The Court finds that Defendant’s
9 approximation of its attorney’s fees and costs is purely speculative, and orders
10 Plaintiff to post a \$39,799.00 bond within seven days of the filing of this Order.

11 For the reasons stated above, the Court **DISSOLVES** its June 13, 2013
12 Order, **GRANTS** Plaintiffs’ request for a preliminary injunction and **FURTHER**
13 **ORDERS** Plaintiffs to pay a \$39,799.00 bond within seven days of the docketing of
14 this Order. Defendant is enjoined from taking any steps to deprive Plaintiffs of their
15 residence in and possession of the property located at 8248 Rockview Drive, El
16 Cajon, California.

17 **IT IS SO ORDERED.**

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19 DATED: August 16, 2013

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Honorable Janis L. Sammartino
21 United States District Judge

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